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# Consumer Protection and Product Liability: Europe and the EEC

Thomas Trumpy\*

## I. Introduction

Product liability is increasingly and correctly considered a public consumer protection issue,<sup>1</sup> rather than a civil tort or contract matter.<sup>2</sup> Consumer protection is a new field necessitated by the sophisticated technologies and expanded markets that emerged as a result of post-World War II industrial development.<sup>3</sup> Consumer protection

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<sup>1</sup> For historical reasons, the Consumer Protection Directorate of the European Economic Community (EEC), General Directorate XI, is separate from and in competition for funding with, the Trade Directorate, General Directorate III, which is responsible for product liability. See *infra* note 11. An example of a consumer protection measure against dangerous products that is not part of "product liability" is the EEC Directive requiring notification of a "transfrontier shipment of hazardous waste." See BEUC NEWS, July/Aug. 1984, at 3.

<sup>2</sup> The common law concept of tort is not exactly matched in the civil law. The only civil law code of "delicts" is found in the criminal code, which permits joinder of a private civil claim for relief to a criminal action for theft, embezzlement, fraud, etc. See *infra* note 19. The commercial code classifies consumer torts as failures to meet very broadly defined obligations of fair dealing in contractual matters (a sort of *delictus ex contractu*). For these reasons, the protection of consumers against false advertising and other unfair *pre-contractual* practices not constituting criminal fraud has been by statute and any existing regulations and case law.

Liability with respect to the fitness of the merchandise for its intended use is not covered by the EEC Product Liability Directive 85/374/EEC, 29 O.J. EUR. COMM. (No. L 210) 29 (1985). It is solely a subject of national law and the OECD programs. See *infra* note 13 on warranties. The Directive is to be effective (by national legislation) on July 30, 1988. Paragraph "d" of the introductory commentary to article 6 of the original proposal for the EEC Product Liability Directive (COM (76) 372 Final) provides for reservation of rights based on contract to "the laws of the Member States by the law relating to the sale of goods. This field is not affected by the Directive." The commentary on article 11 speaks in confused terms of the directive relating to tort and not contract. Mr. H.C. Taschner from EEC General Directorate III, "author" of the Directive, confirmed the "delictual" character of the EEC cause of action at a meeting on November 26, 1985 in Brussels.

<sup>3</sup> Principal consumer protection laws have only been enacted recently. See OECD, CONSUMER POLICY DURING THE PAST TEN YEARS: MAIN DEVELOPMENTS AND PROSPECTS 21, 22 (1983); OECD, ANNUAL REPORTS ON CONSUMER POLICY IN OECD MEMBER COUNTRIES (1983). Prior efforts were frequently rather tentative because of an insufficient under-

has also been shaped by the gradual attitudinal shift from *laissez faire* capitalism to state guardianship of its citizens.

Evolution of consumer protection law has been tortuous in countries like the United States where common law tort principles such as *caveat emptor* and contract rules requiring privity between the defendant manufacturer or seller and the injured party have imposed quasi-contractual limits on responsibility.<sup>4</sup> U.S. courts have been hindered in attempting to balance the interests of consumers, producers, sellers, lessors, and insurers because common law legal principles predicated on antiquated notions like the artisan's duty to his client do not reflect modern commercial realities.

Certain civil law legal theories have made evolution of consumer protection law less difficult in Europe.<sup>5</sup> These theories provided at

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standing of market dynamics, and such efforts were only precatory and lacked rapid public enforcement and private recourse provisions. See also *L'Organisation et l'Information des Consommateurs dans la Communauté Européenne*, DOCUMENTATION EUROPEENNE (1973).

In 1975 the EEC Consumer Programme was drafted under the title Council Resolution of April 14, 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 18 O.J. EUR. COMM. (No. C 92) 1 (1975), which was renewed in 1981. Council Resolution of May 19, 1981 on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy, 24 O.J. EUR. COMM. (No. C 133) 1 (1981). The Programme is directed to consumer information and protection pursuant to articles 2 and 85 of the Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11. The Programme as a whole has not yet been proposed for adoption as EEC law, each proposal for law being specific. In those areas where the member countries harmonize regulations and develop standards by direct, non-EEC action, EEC action may become moot. See *infra* notes 11, 46.

A balance sheet of EEC proposed actions and complete directives appears in BEUC NEWS, Nov. 1983, at 11.

<sup>4</sup> Protection arising out of a contract has been derived from the commercial code. See, e.g., FRENCH CODE CIVIL [C. CIV.] arts. 1134, 1135 (requiring respect for a party's agreements and the "good faith" performance of such engagements). The RESTATEMENT (SECOND) OF TORTS § 402(A) (1979) provides similarly that:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property, if:
  - (a) The seller is engaged in the business of selling such a product, and
  - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in subsection (1) applies although:
  - (a) The seller has exercised all possible care in the preparation and sale of his product, and
  - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

<sup>5</sup> The theory of concealed defect ("vice cache" in French) has a long history. Under French C. Civ. art. 1641, no disclaimer can excuse or limit damages for a concealed defect, but notice as to the proper conditions for use can avoid liability for misuse. The very strict position of the French law, compared to the demands of other EEC countries for various limits and exclusions, was one of the reasons for the difficulty of the EEC in reaching agreement on the EEC Product Liability Directive.

Strict liability, particularly for physical injury or death from inherently imperceivable risks, such as with pharmaceuticals, exists in:

1. Germany by statute (with a ceiling on total damages) (law of August 21, 1946);

least as much real consumer protection in Europe prior to 1960 as in the United States, although cases reported in the United States would suggest U.S. consumers were better protected. Few persons on either continent, however, were as offended or belligerent, persistent and wealthy as Mr. MacPherson when his beautiful Buick propelled him into legal history.<sup>6</sup> In practice, both U.S. and European consumers had few avenues for legal recourse until recently.

#### A. Scope and Analysis

This article only examines issues relevant to the U.S. bar, consumer groups, and corporations.<sup>7</sup> Consequently, other concerns equally important to Europeans such as consumer protection for services like package holidays,<sup>8</sup> investment advice,<sup>9</sup> and purely "legal" issues such as successor corporation liability<sup>10</sup> will not be discussed.

There are four approaches to analyzing consumer protection problems that are useful in different circumstances. Discussion of each of these categories will facilitate understanding of this article.

First, the jurisdictional approach encompasses the following issues which define parties having rights to complain:

1. Protection of the person (health and safety);<sup>11</sup>

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2. Sweden by agreement with the industry;

3. Belgium, France, and Luxembourg by case law based on code.

Such liability does not exist in the United Kingdom.

A case in the United Kingdom required proof of negligence even when this would require access to otherwise inaccessible files. See *British Charity or American Justice*, THE ECONOMIST, Apr. 14, 1984, at 28.

See the discussion of no-fault in Sweden and Germany (law of August 21, 1976) in *Dossier*, BEUC NEWS, Feb. 1984, at 1. See also the defenses provided in the EEC Product Liability Directive, *supra* note 2, article 7, and the burden of proof of victims under article 4; see the defenses provided in the Strasbourg Convention, *infra* note 118.

<sup>6</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (cited in Goldstein, *Product Liability and the Trademark Owner: When a Trademark Is a Warranty*, 32 BUS. LAW. 957 (1979)).

<sup>7</sup> Thus, door-to-door solicitations, retail and minimum pricing laws, product testing and labeling procedures, promotional or discount price schemes, and services are beyond the scope of this article.

<sup>8</sup> See OECD, CONSUMER PROTECTION CONCERNING AIR PACKAGE TOURS (1980); see *infra* note 14.

<sup>9</sup> See generally OECD, ANNUAL REPORT ON CONSUMER POLICY IN OECD MEMBER COUNTRIES (1985).

<sup>10</sup> The law on this problem is not developed in Europe. No consideration of this problem has been undertaken under the EEC Product Liability Directive, *supra* note 2, and no cases to date were mentioned by the EEC staff in 1984.

<sup>11</sup> *Labeling*

As to labeling, see U.C.C. § 2-314(2), (6) (1978); Goldstein, *supra* note 6, at 965; The European Community Directive on Food Labeling, BEUC Document 92/82, July 1982, at 12 (speaking favorably of the harmonizing effect of the Directive). Amendments to the Directive are expected by 1987. The French Cour de Cassation (Cour de Cass., Civ. Ière, 14.12.1982) interpreted article 1135 of the French Civil Code to find that a manufacturer's obligation to provide information about a product arose out of the "obligation, not only for what is expressed in (the conventions), but also for all the consequence which equity,

## 2. Protection of the property rights (of buyers, owners, les-

usage or law confers on this obligation, according to its nature." BEUC LEGAL NEWS, Sept. 1984, at 11.

See also a Danish case where "seconds" (second choice quality goods) were imported as first quality goods. In interpreting article 30 of the Treaty of Rome, *supra* note 3, the court held that the nature of the imported goods has to be indicated. Hojesterets Dec. 2, 1981, Ugeskrift for Retsvaesen 1982, at 69-79, *discussed in* BEUC LEGAL NEWS, Sept. 1983, at 8 (citing *IMERCO*, 1981 C.J. Comm. E. Rec. 181).

Requirements of the EAN labeling provision (European Article Numbering system of "bar codes" on consumer products) and of the EEC Food Labeling Directive, 22 O.J. EUR. COMM. (No. L 33) 1 (1979), include: product name, ingredients, quantity, durability, storage conditions, EEC producer or seller, origin, and use instruction.

### *The Dangerous Product Directives*

Based upon its conclusion that the pharmaceutical and cosmetic standards set by EEC General Directorate III do not apply to or allow the adoption of emergency measures, the EEC Commission determined that products subject to such other directives were not to be excluded from the new directive—an unfortunate duplication of incompetence in this field. Products may be excluded in the future if found to have an adequate "early warning" system.

The EEC originally regulated cosmetics and foodstuffs through exclusionary lists of prohibited ingredients. Since 1982 the revised system establishes a list of "approved" products to which the Commission can add by administrative directive. The potential legal liability of the EEC for "approval" of a product which is later determined to be dangerous is a subject awaiting analysis and commentary. Legal immunity appears *not* to exist.

### *EEC-Information Exchange*

#### *Dangerous Products*

The EEC has adopted a system for rapid exchange of information on dangerous products. Dangerous Product Notification Directive 84/133/EEC, 27 O.J. EUR. COMM. (No. L 70) 16 (1984). See *infra* for the BEUC commentary on this dangerous products notification procedure. This is an example of the confusion arising from the overlapping claims of authority of General Directorate XI, responsible for consumer protection, and General Directorate III (Trade), responsible for product liability and safety. Further confusion arises because asbestos risks affecting workers arise mainly in the preparation of products, and pursuant to articles 117 and 118 of the Treaty of Rome, *supra* note 3, asbestos-related injuries are placed under the surveillance of the Employment, Social Affairs and Education General Directorate (Directorate V), not General Directorates III or XI. See *Dossier*, BEUC NEWS, Sept. 1983.

One purpose of the Dangerous Product Notification Directive is to work out the problems regarding the exclusion of certain products covered by other regulations. See BEUC NEWS, Feb. 1984, at 6, for an analysis. See also EEC Technical Standards Directive 83/189/EEC, 26 O.J. EUR. COMM. (No. L 109) 8 (1983) (establishing an information procedure in the field of technical standards and rules).

The BEUC's comments on the Dangerous Product Notification Directive adopted by the EEC in December 1983 are to the effect that:

1. a finding of a danger in one state will not bar sale elsewhere;
2. only states may give notice to the EEC;
3. such notices can be kept confidential by the EEC at the sender's request (incompatible with the statements of the EEC consumer program);
4. no warning is given to third countries; and
5. the scope of exemptions is not clear.

BEUC NEWS, Dec. 1983, at 5. The Directive does not establish or encourage product recall or direct action. See *infra* note 42 for a summary of national legislation. See also OECD, RECALL PROCEDURES FOR UNSAFE PRODUCTS SOLD TO THE PUBLIC (1981); BEUC's *Plea for a Consumer Safety Directive*, BEUC NEWS LEGAL SUPP., June 1986, at 7.

#### *Excess Detail*

A recent case of rejection of a proposed directive for excess detail is the Dangerous Toy Directive rejected by the European Parliament. See BEUC NEWS, Feb. 1984, at 2 (referring to the draft directive, O.J. No. C203/83). See also BEUC NEWS, Feb. 1986, at 14, concerning need for action which is expected soon. A directive may be rejected when the nature of the problem and diversity of the products are difficult to regulate. A more mod-

sors, users, and others);<sup>12</sup>

est solution would be incorporation of existing industry norms as a directive. See *infra* note 42.

In the absence of an EEC instrument, the United Kingdom took separate action to ban sale of children's toys with contaminated water inside. See *Interpol*, BEUC News, Sept. 1983, at 1 ("bubble lamps" for children had been filled with tri- and tetra-chloroethylene and carbon tetrachloride). For a review of pending national laws, decrees, and regulations, see *Toys Which Imitate Food Products*, BEUC News, Feb. 1985, at 15; see *infra* note 42. Apparently when the substance is a toxic chemical (instead of contaminated water) the EEC can act. Dangerous Substance Directive 79/769/EEC, 22 O.J. EUR. COMM. (No. L 197) 37 (1979); see also BEUC News, Feb. 1984, at 2.

#### *Manufacturer's Liability*

A Belgian appeals court has ruled that a reseller of a dangerous product is not liable for damages if the information on the product is not complete. Only the *manufacturer* is liable for failure to inform the public. The result in this case would be interesting if articles 3.3, 5, and 8 of the EEC Directive were applied. BEUC LEGAL NEWS, Sept. 1984, at 10 (citing a decision of the Cour d'Appel of June 16, 1982). See also *infra* note 30.

#### *Asbestos*

As to the failure of two proposed directives (7975/83 SOC 159 of June 30, 1983 and 7503/83 ENT 54 of June 1983) to deal with exposure to asbestos despite the favorable opinions of the Economic and Social Committee and of the Committee on the Environment, Public Health, and Consumer Protection of the European Parliament, see *Dossier Asbestos*, BEUC News, Sept. 1983. This important issue has become mired in a tug-of-war between the European Parliament and the Commission.

#### *Injury: Property and Persons*

The EEC Product Liability Directive, *supra* note 2, specifically provides for recoveries by injured parties of money damages for:

1. damage to persons—*injury or death* (article 9(a));
2. damage to property (article 9(b)); and
3. pain, suffering, and "nonmaterial" damage.

A limitation in the amount of damages is permitted for the article 9(a) death or personal injury loss under article 16.1. See *infra* note 112. "Commercial" property losses are excluded. See *infra* note 14.

"Pain and suffering" was put into the preamble and article 6(c) of the proposal for the EEC Product Liability Directive as part of the parliamentary debates. It now appears in the last paragraph of article 9 of the Directive, *supra* note 2. Pain and suffering damages are to be determined in accordance with national law and thus, are not subject to the monetary limits imposed by article 16 for death and personal injury damages. See *infra* note 112.

#### <sup>12</sup> *Advertising and Marketing Practices*

The EEC Misleading Advertising Directive was finally adopted on Sept. 10, 1984, 84/450/EEC, 27 O.J. EUR. COMM. (No. L 250) 17 (1984). See *Editorial*, BEUC News, June 1984, at 1. The Directive was supported by both manufacturers and consumers, but its promulgation was delayed by the desire of certain countries (Britain, Denmark) to leave this area to national regulation. For this reason, the "unfair advertising" aspects were omitted from the final Directive. The same concerns have been expressed about the "doorstep selling directive." *Editorial*, BEUC News, Dec. 1983, at 1.

The Misleading Advertising Directive has no provision for penalties or private causes of action but permits national law to define who may have the requisite interest to bring such an action if otherwise allowed by national law. Its utility is therefore correctly suspect.

The Directive defines misleading advertising as "any advertising which in any way, including its presentation deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which by reason of its deceptive nature is likely to affect their economic behaviour or which for those reasons injures or is likely to injure a competitor." EEC Press Release 1P (84) 234 of June 29, 1984. Concern is also being expressed as to the problems of new advertising media and cross-border advertising. See BEUC News, Jan. 1984, at 4. Interestingly, a recent Luxembourg law has unilaterally made advertising part of a contract of sale and permits rescission of the contract or a price reduction if those terms are breached by unfair advertising. See OECD, ADVERTISING

### 3. Rights to the bargain (inconvenience or right to expected

PROCEDURES FOR UNSAFE PRODUCTS SOLD TO THE PUBLIC (1982); OECD, ADVERTISING DIRECTED AT CHILDREN (1982).

Liability for using a false or misleading representation as to goods or for failing to correct significant information is imposed under the law of several Scandinavian countries. See, e.g., Sweden's Marketing Practices Act, Act 1418 of 1975, *amended by* Act 233 of 1980, §§ 3, 6 (omission to provide material information to consumers may result in court ordered disclosure; intentional misleading of consumers results in fines or imprisonment); The Danish Marketing Practices Act, Act 297 of June 14, 1974, § 2 (use of false, misleading, or unreasonably incomplete statements regarding goods, real property, or services is an offense).

An unusual development in Belgium is that the consumer association, "Test-Achats," has entered the business of offering legal assistance insurance to consumers for personal disputes, including consumer disputes. BEUC NEWS LEGAL SUPP., Mar. 1985, at 10.

With respect to "door-to-door" selling, see Council Directive of December 20, 1985 to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises 85/577/EEC, 28 O.J. EUR. COMM. (No. L 372) 31 (1985); *Door-to-Door Sales*, BEUC NEWS LEGAL SUPP., Nov./Dec. 1985, at 1.

#### *Warranty Terms*

In the United Kingdom, the Consumer Credit Act of 1974 guarantees to the buyer that products shall show "reasonable fitness" for intended use. This obligation of the seller is in reality a limit on its liability as no redress is available to a victim if the reasonableness standard is met. Whincup, *Product Liability Laws in Common Market Countries*, 19 COMMON MKT. L. REV. 521, 523 (1982). See summary of rules of EEC member states in BEUC NEWS, June 1986, at 5.

The EEC Product Liability Directive, *supra* note 2, art. 6, provides: "A product is defective when it does not provide the safety which a person is entitled to expect." The Directive will therefore probably expand the British rule as to consumer rights and seller liability.

The issue remains as to how a warranty of merchantability can be given if a product is sold to another country and must meet the norms of the receiving country. A possible solution would be for a manufacturer selling to the EEC to meet the highest safety standards of any EEC country under a theory that the products they sell must be safe, and that selling them with a statement of the safety requirements of each receiving country (for example, on grounded electric plugs) may not relieve the manufacturer of liability if the standard is not met. See, e.g., *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972).

#### *Financing and Pricing Deception—Consumer Credit*

The EEC Installment Sales-Consumer Credit Directive proposed in 1979 has been reviewed by the European Parliament and is awaiting action. See Amended Proposal 27 O.J. EUR. COMM. (No. C 83) 4 (1984). Most EEC countries regulate installment buying; only France and Britain regulate other forms of credit.

As to requirements for indication of prices the EEC has:

1. adopted Directive 79/581/EEC, 22 O.J. EUR. COMM. (No. L 158) 19 (1979), as to the indication of food pricing (by weight or volume);
2. made a Proposal for a Council Directive on Consumer Protection in Respect of the Indication of Prices of Non-Food Products, 27 O.J. EUR. COMM. (No. C 8) 2 (1984).

The proposal was amended to allow greater freedom to member states. See *infra* note 46. 27 O.J. EUR. COMM. (No. C 83) 4 (1984). The text, poorly drafted, is full of exemptions (particularly pharmaceuticals and cosmetics) which will make member state laws difficult to adopt without creating a vast bureaucracy or a mass of litigation. Adoption in the present form is doubtful. European Parliament action should be followed. See OECD, BARGAIN PRICE OFFERS AND SIMILAR MARKETING PRACTICES (1980); OECD, PREMIUM OFFERS AND SIMILAR MARKETING PRACTICES (1977).

#### *Unfair Contract Terms*

The EEC has released a discussion paper on Unfair Terms in Consumer Contracts which may lead to the preparation of a directive on this subject. Supplement 1/84 Bull. E.C.

The Council of Europe, Committee of Ministers, adopted Resolution (78)3 on Jan. 20,

use);<sup>13</sup>

4. Protection of economic rights (including rights between merchants);<sup>14</sup>

5. Protection of the public interest in the safety and health of its citizens.<sup>15</sup>

Second, consumer protection may be analyzed in terms of the public or private remedies and responsibilities available in various legal systems:

1. Private rights to money damages inherent in U.S. jurisprudence;<sup>16</sup>

2. Private rights to specific performance or putting the parties in their expected/intended positions inherent in the European civil code system;<sup>17</sup>

3. Private rights to demand punishment of offenders, which

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1978. It asks member states to ban certain types of penalty and forfeit clauses in consumer contracts. See UNFAIR CONTRACT CLAUSES IN CONSUMER CONTRACTS (T. Bourgoignie ed. 1983); Killerby, *The Work of the Council of Europe on Unfair Terms in Consumer Contracts*, 1 INT'L CONTRACT 95 (1980); Hondius, *Unfair Contract Terms: New Control Systems*, 26 AM. J. COMP. L. 525 (1978).

<sup>13</sup> *Extended Warranty*

Extended warranty contracts are offered principally with goods such as automobiles and major domestic appliances. These contracts cover the failure to function and any damage to the goods caused by the product itself, including parts and labor. The legal guarantee is not waived in any case. Exclusions cover:

1. damage caused by any unauthorized repairer or due to repair;
2. damage, depreciation, or replacement of consumable parts due to normal usage; and
3. any commercial use.

In case of total loss, there is a schedule of declining replacement value. In some cases, the extended warranty is offered and performed by the manufacturer. This type of warranty disguises warranty defect replacement work with a customer-paid program, not required to be included in the purchase price. The most probable areas of abuse will appear in consumer fire and theft alarm systems, automobiles, and electric appliances. The EEC has not considered these questions to date. See *supra* notes 11-12.

<sup>14</sup> *Loss of Profits and Earnings*

The EEC Product Liability Directive does not cover loss in commercial sales, which remain governed by national law. Statements in the preamble to the Directive limit claims for property damage to personal property for personal use. See EEC Product Liability Directive, *supra* note 2, art. 9(b). Loss of earnings due to "professional" use of the defective product are therefore excluded.

The Hague Convention covers damages to both persons and property, including economic loss, when accompanied by other damages. Convention on the Law Applicable to Products Liability, Oct. 2, 1973, 1977 Recueil des Traites et Accords de la France 82, reprinted in PRODUCT LIABILITY IN EUROPE 127 (1975). The Strasbourg Convention does not provide for loss of profits, but national laws in France, Belgium, and the Netherlands permit recovery for such loss. Whincup, *supra* note 12.

<sup>15</sup> See *supra* notes 7, 11-14.

<sup>16</sup> The award of punitive or exemplary damages to private parties, quite common in the United States, is unknown in Europe, except for some representative consumer organizations in France. The usual attitude is that any penalty belongs to the state, not the aggrieved individual. We have found no reference to availability of augmented damages in Europe. Occasionally fines may be imposed but not for the benefit of the victim and only in France for a consumer group. Treble damages apparently do not exist in Europe.

<sup>17</sup> In principle, EEC directives create no private actions; each country should adopt a corresponding law. If a country has not acted, the only relief available would be in the nature of a mandamus brought by the EEC Commission under article 169 of the Treaty of



involve distinct historical developments in each legal system;<sup>18</sup>

4. Civil law principles permitting joinder of a civil complaint for money damages and perhaps for specific performance to a criminal complaint;<sup>19</sup>

5. Public remedies, including the state's rights as statutory subrogee when it has undertaken, through social assurance programs like unemployment or workmen's compensation to stand in the legal place of the party civilly responsible for a person's dependence on public resources;<sup>20</sup>

6. Regulatory orders proscribing certain practices<sup>21</sup> or affirm-

Rome directing a government to adopt legislation. *But see* Becker v. Finanzamt Muenster, 1982 E. Comm. Ct. J. Rep. 53, COMMON MKT. REP. (CCH) ¶ 8789.

Because provisions for class action suits, *see infra* note 26, or for punitive, exemplary or treble damages, *see supra* note 16, are rare, the only means of private suit by a number of victims is joinder within national courts, a costly and cumbersome procedure. An example is the consolidation of cases in France relating to a harmful cosmetic under the name *Talc Morange*. *See also supra* notes 11-14.

<sup>18</sup> In Sweden, the Market Court works closely with the ombud in policy issues. It has the power to enjoin marketing practices and to impose penalties and may grant interim injunctions and restraining orders pending court resolution of legal issues. Its decisions, which are final and *without appeal*, serve as precedent in other courts. *See* KONSUMENTOMBUDSMANNEN, REPORT TO OECD CONSUMER AFFAIRS COMMITTEE, Feb. 22, 1973 [hereinafter cited as KONSUMENTOMBUDSMANNEN]; CONSUMER PROTECTION IN SWEDEN (undated pamphlet from Swedish National Board for Consumer Policies [hereinafter cited as CONSUMER PROTECTION]).

For a description of a consumer arbitration board for the Belgian dry-cleaning sector established by agreement of industry and consumer representative, without government initiative, *see* BEUC NEWS, Mar. 1985, at 9. *See also supra* notes 4-5.

<sup>19</sup> The basic premise of the civil law giving rise to a criminal lawsuit is that he who hurts another directly or indirectly is responsible for his act. It is therefore logical to permit one court to judge both the civil and criminal consequences of the same acts and responsibilities. Trials are to a judge except in certain criminal cases where a jury may sit on the liability issue.

In Germany, for example, a private action for recovery of the value of property may be joined in a criminal case for conversion or damage to material interests. Civil recovery is permitted only if conviction results from the criminal case. Fisch, *European Analogues to the Class Action: Group Action in France and Germany*, 27 AM. J. COMP. L. 51, 75 (1979). In France it has recently been held that there can be no civil recovery in such a "piggy-back" action unless the criminal verdict is upheld. *See Action Civile: des Nuages . . .*, CONSOMMATEURS ACTUALITE, Feb. 1985, at 1.

It has been suggested that de-criminalization of consumer cases is in the consumer's interest as it would meet the goals of consumer protection, and, in addition, remove a barrier to negotiation of settlements, when recognition of civil liability would be self-incriminating.

To the extent that a fine is penal, it is not tax deductible to a business. Compared to civil damages, therefore, criminal fines are automatically "double" in cost; *see supra* note 16. In Germany, the Federal Financial Court allowed tax deductibility of fines for economic crimes (*e.g.*, antitrust), but the government is preparing to reverse this by law. Address by N. Reich to European Consumer Law Group (Mar. 19, 1984).

<sup>20</sup> Social insurances in Europe generally include: (1) unemployment; (2) old age; (3) dependent children; (4) medical care, covering costs of doctors, hospitals, and medicines. They are generally obligatory and cover the unemployed as well as the employed. *See supra* note 21 for a discussion of available criminal actions.

<sup>21</sup> The principle that liability cannot be excluded or limited appears in article 12 of the EEC Product Liability Directive, *supra* note 2. Disclaimers of liability by producers are therefore denied effect as to private consumer injuries. Disclaimers, warnings, and limitation clauses, however, may define what is improper use (making the victim co-responsible), may remain effective as to purchases for commercial or professional use, and may limit or

atively prescribing labeling, make-good, or reimbursement;<sup>22</sup>

7. Collective remedies on behalf of an affected class either through public interventions,<sup>23</sup> such as product recall<sup>24</sup> or desig-

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avoid claims for punitive damages as well as any fines or criminal responsibility. See also *supra* notes 11-13.

<sup>22</sup> The BEUC (European Office of Consumer Associations) has suggested that the principle of the free circulation of goods does not preempt the requirement of fairly stating the quality or comparative ingredients of one product (imported) against another (domestic). See THE EUROPEAN COMMUNITY DIRECTIVE ON FOOD LABELING, BEUC Document 92/82, July 1982, at 11, for a discussion of the wide variance of supplemental national rules. This book also surveys prior national requirements and lists all specific "vertical" directives. See *supra* note 11 for a discussion of the provisions of the EEC Food Labeling Directive; see *infra* note 24 for the individual government's limited right to order recall under national law. See also *Door-to-Door Sales*, *supra* note 12, at 1 (new German law).

<sup>23</sup> As of 1984, no EEC country had established a consumer ministry. Consumer questions in the EEC countries are handled by various other ministries, *inter alia*, the Ministry of Economics (the Netherlands, France); Ministry of Trade (Greece, Ireland, Italy, Luxembourg); Ministry of Justice (Germany); and by the Under Secretariat for Corporate and Consumer Affairs (United Kingdom). Consumer departments exist in Britain and France and may exist in Greece, but do not have ministerial rank. Other countries in the EEC have lower level offices to handle consumer questions.

In Sweden, the Public Complaints Board is an independent body organized in ten sections, each with a chairman and four to ten members. The chairman is a lawyer with qualifications to serve as judge, and the members are selected from the business and consumer sectors. Its decisions (not subject to appeal) are recommendations for specific cases based on the regulations. The Board has power to settle disputes between buyers and sellers at the request of individual consumers, and in case of noncompliance with its recommendations, may bring suit in the ordinary courts of law by reason of a provision of the "Act on Simplified Procedure in Small Claims." CONSUMER PROTECTION, *supra* note 18.

The Swedish system of courts and boards enforces several laws. The Marketing Act of 1976 prohibits practices that are undesirable or contrary to normal business practices. The Act requires the provision of adequate information to plaintiffs seeking prohibition of the sale of harmful goods, and the burden of proof is on the seller to defend its position. See *supra* note 18 for further discussion of the Marketing Act.

Similarly, the Danish Consumer Complaints Board Act, No. 305 of June 14, 1974, creates a board to handle consumer complaints within guidelines provided by the Minister of Commerce. The Minister of Commerce determines procedures for the Board and appoints the members of the Board. The Board may act on its own initiative or can bring a case before the courts at the request and on behalf of an individual. A complaint by the Board can be made if (1) it complies with the provisions of the Danish Administration of Justice Act, Danish Consumer Complaints Board Act, No. 305 of June 14, 1974, § 4, and (2) the defendant can be sued in Danish courts. *Id.* § 6. A decision by the Board on a complaint suspends all court or other actions related to a matter. *Id.* § 8.

The French law of July 21, 1983 (effective 1985) establishes a Consumer Safety Committee. The members have apparent authority to investigate, but are all state appointees representing different sectors. BEUC NEWS LEGAL SUPP., July 1984, at 1.

The Department of Trade and Industry in the United Kingdom has power to ban products. It was responsible for removing from the market an unsafe retardant as well as certain toys filled with polluted water. See *supra* note 11.

Several EEC countries have adopted an ombud system to deal with consumer issues. The United Kingdom has an ombud with limited power of initiation of action. See THE ECONOMIST Feb. 8, 1986, at 29. While Belgium does not have an ombud system, several Belgian towns have named local ombuds on an experimental basis. This is interesting as it is one of the first non-Scandinavian uses of the system. Scott, *Ombudsman for Angry Consumer*, THE BULLETIN, Dec. 1984 at 20.

The need for full national legislative support for an effective consumer program is indicated by the broad functions and powers of ombuds in Scandinavia. In Sweden, these include assuring fairness to consumers in advertising, marketing practices, and standard (adhesion) contracts by means of access of the ombud to civil courts, the power to request

nated rights to intervene, or recovery of the damage to the public;<sup>25</sup>

8. "Class actions" brought by any private party on behalf of a class but for damages limited to those of the complainants;<sup>26</sup>

injunctions (sanctioned by fines and penalties), and the power to make complaints either in the Market Court or in the criminal courts. The ombud also may affect the development of consumer law in his role as Chairman of the Governing Council of the National Board for Common Policies. See KONSUMENTOMBUDSMANNEN, *supra* note 18; CONSUMER PROTECTION, *supra* note 18. In addition to the national ombuds, Sweden has local consumer councils or authorities that advise consumers as to their legal rights, pass complaints to the National Board for Consumer Policies or to the Public Complaints Board, maintain contact with the National Board for Consumer Policies (created on July 1, 1976), and work with popular movements for consumer rights. See *id.*

In Denmark, the role of the ombud is more limited. The ombud is charged with ensuring compliance with the standards of the Marketing Practices Act, No. 297 of June 14, 1974, but may only refer matters to the Danish court system for decision. His role, therefore, is less than that of the Norwegian and Swedish ombuds whose roles may be compared to that of a "regulatory agency" (*e.g.*, FTC or FDA) in U.S. practice.

In Norway, there are two ombuds, one responsible for consumer complaints against business, and the other for claims against the state and its functionaries.

<sup>24</sup> The rights of governments to force recall of products other than food, drugs, and cosmetics are very limited. None of the EEC initiatives would create any such government rights. See *Product Recall in the European Community*, BEUC LEGAL NEWS, Dec. 1982, at 2. Some recall may be effected by "de-licensing" a product for sale where a license is required (*e.g.*, foods, pharmaceuticals). Recall is increasingly favored by governments (*e.g.*, the proposed French consumer law discussed *infra* note 26), and a directive may be proposed soon.

The stigma of voluntary recall, and the risks that it would lead to additional spurious claims, is cited as a reason for quiet private settlement. The claims made in the United States in the "Toxic Shock Syndrome" cases further reinforce opinion against recall. Moreover, the question of effective recall after secondary level *foreign* sales, even within the EEC, is an unresolved problem that no one appears eager to take up. Recall in the country of production would not, therefore, affect recall elsewhere because there is no "reverse" *Cassis de Dijon* rule. See *infra* notes 23, 66-67. As to "de-licensing" of products as a means of progressive recall, see *supra* note 23 for the description of Belgian practice. See also OECD, RECALL PROCEDURES FOR UNSAFE PRODUCTS SOLD TO THE PUBLIC (1981). For a recent review of U.S. practice, see *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 BUS. LAW. 757 (1984).

<sup>25</sup> The "damage to the public" includes the cost of social transfer payments and loss of economic activity.

<sup>26</sup> The European Consumer Law Group (E.C.L.G.), *infra* note 42, provides some definitions of terms:

A *class action* is an action where one or more members of a group or organization further the interests of the entire group in initiating proceedings.

A *general interest action* is one where the interest furthered or protected is a general interest as opposed to a specific interest of the plaintiff or of members of the group.

BEUC, REPORT ON GROUP ACTIONS, E.C.L.G., (Aug. 1982). See Stuyck, *The ECLG Report on Group Actions—A Comment*, 6 J. CONSUMER POL'Y 351 (1983).

An explanation of the failure of Europe to provide for class actions has been drawn from the concept that "collective interests" or "general interests" are *public* interests to be dealt with by public, not private action. Thus, an individual or a group of individuals lacks legal standing to act on behalf of the public or the state, and true class actions (suits on behalf of an affected class of victims) do not exist in Europe.

Pursuant to the EEC Preliminary Programme for a Consumer Protection and Information Policy, *supra* note 3, the EEC has proposed several directives which would permit general interest actions at law in the following areas: (1) consumer credit, (2) standard terms in contract, and (3) misleading and unfair advertising. See *supra* note 12.

As to class actions and public interest lawsuits under national law, see *Collective Litigation*, BEUC LEGAL NEWS, Sept. 1982, at 2. The note discusses the problem of standing to

9. "Punitive damages" awarded by the state as a designated collective intervenor or to the private representative of a class (for example, a consumer group).<sup>27</sup>

The third approach addresses procedural questions of liability:

1. Which judicial or administrative forum or body is competent and can take jurisdiction over all necessary parties;<sup>28</sup>
2. Who may assert responsibility;<sup>29</sup>
3. Who are the parties responsible at law;<sup>30</sup>

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sue by consumer groups, either by interpretation or legislation. The national legislation of the EEC countries is summarized. See the update in BEUC NEWS LEGAL SUPP., Mar. 1985, at 10, and the review of the proposed new French consumer law with "general interest" and class actions in *Proposals for a New Consumer Code in France*, BEUC NEWS LEGAL SUPP., Nov./Dec. 1985.

For example, "collective interest" suits under French law afford injunctive and collective damage relief, but:

1. The group must exist before the incident (*e.g.*, tourist groups unlike the typical U.S. class action);
2. The group must decide by a majority or consensus to take action (unlike U.S. judicial certification);
3. No individual may act alone for an organization or force an organization to sue or to represent him (unlike a U.S. class and unlike the rights of an ombud);
4. Each party must appear in all pleadings and procedures; and
5. Any third party seeking damages from the same conduct must prove fault.

Fisch, *supra* note 19, at 67-69.

The only liberalization of these requirements is for class actions under the French Law for the Guidance of Commerce and Crafts, Law No. 73-1193, 1974 J.C.P. III No. 41167. Article 46 permits an "action civile" or private action as follows:

[D]uly registered associations whose explicit charter object is to defend the interests of consumers may, if they are approved for that purpose, bring private actions before any jurisdiction with respect to acts causing harm directly or indirectly to the collective interest of consumers.

*Id.* art. 46. See *supra* note 18 for a discussion of punitive damages which may be awarded to some consumer groups in EEC countries.

In Germany, if there is joint interest in the subject matter of similar claims, joinder may be permitted. Associations may intervene only if (1) the association has a contractual relation with the individual, and (2) the group itself has an interest in the case, independent of the members. In Germany, therefore, consumer and environmental organizations may not represent groups except to sue for injunction, and not damages. Fisch, *supra* note 19, at 75-76.

As to Italian practice under article 2601 of the Italian Civil Code, see also BEUC LEGAL NEWS, Sept. 1983, at 10 (dealing with true collective suits, not public or class actions).

The Netherlands gives a special legal status to consumer organizations. Belgium requires statutory recognition of the representative role of an organization before it may represent the "collective" interest of consumers.

<sup>27</sup> See *supra* notes 16, 19 for a description of available criminal penalties as well as punitive damages.

<sup>28</sup> See *supra* notes 18, 23 for a discussion of available fora in EEC member nations. See also *supra* note 11.

<sup>29</sup> See *supra* notes 23, 26.

<sup>30</sup> Article 3 of the EEC Product Liability Directive, *supra* note 2, puts liability for product-caused injury and damage on the "producer," not the seller. It then extends such liabilities to importers, brand name and trademark (but not patent) licensors, and, in certain cases, to resellers.

Successive parties in trade may be liable under French law for different faults (defective product, negligent installations, unintended use). A case in Rouen (Iere Chambre Civile) held the manufacturer, the seller, and the user liable in different degrees for the

4. What are the time limits for claims;<sup>31</sup>
5. What are the defenses, burdens, and manner of proof.<sup>32</sup>

The final approach, like the first, combines jurisdictional elements and substantive empirical circumstances in which consumers increasingly have rights to protection:

1. Product safety;<sup>33</sup>
2. Reliance on assumed fitness or quality;<sup>34</sup>
3. Exaggerated promises that cannot readily be verified;<sup>35</sup>

damages. The manufacturer's liability can therefore be lessened by "contributory" negligence on the part of the seller or user. See BEUC LEGAL NEWS, Sept. 1984, at 11; see *infra* note 93. A provider of false information, even if *not* a seller, may be liable under chapter 5, §§ 1 and 10 of Finland's Consumer Protection Act, Act 38, promulgated Jan. 20, 1978.

The Proposal for a Council Regulation on Community Trade Marks COM (80) 635 Final 2 (Nov. 27, 1980) provides in article 21: "The proprietor of a Community trade mark shall ensure that the quality of the goods manufactured or of the services provided by the licensee is the same as that of the goods manufactured or of the services provided by the proprietor." See also *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *cert. denied*, 444 U.S. 1060 (1980); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972).

Article 3.1 of the EEC Product Liability Directive, *supra* note 2, makes the licensor of a commercial trademark or brandname liable to the same extent as a producer. No proof of reliance or knowledge of the reputation of the mark or brand is required of the plaintiff. It is interesting, and inexplicable, that no similar liability is imposed on licensors of patent rights; even if the patent is the source of the safety defect, as in pharmaceutical cases.

European law has been slow to hold licensors liable for defects in products manufactured by their licensees. See Goldstein, *supra* note 6, at 967 (reliance on families of brands) (e.g., Scotch of 3M Corporation). See also *supra* notes 8, 14 as to who can be held liable.

<sup>31</sup> The statutes of limitations for suit or complaint are partly a matter of national law, and will remain so even after adoption of implementing legislation under the EEC Product Liability and other directives. The EEC Product Liability Directive, *supra* note 2, art. 10, does not supersede national laws that toll the period of prescription (statute of limitations) beyond three years after the victim's "reasonable awareness" of the particular damage, defect, and producer identity. Article 11 sets a limit on suit against the producer 10 years after "putting products in circulations," apparently *without regard* to national "tolling" statutes. Article 11 appears also to bar suit against other defendants assimilated to producers by article 3.

The start of the period for suit for product liability is also a matter of national law. The dispute turns on the applicability of the time of manufacture, the time of sale (whether at each level of sale or only the first or last sale), the time of use, the time of injury, and the time of discovery of the injury and/or of the possible cause. The difference is particularly relevant in cases of deferred damage or damage of indirect causality, with difficult proof such as genetic defects, cancer, or asbestosis.

<sup>32</sup> Under German law, even if damage was caused by the intentional misuse of the product by the plaintiff, the court will not shift to the defendant the burden of proof on product defect. Bundesgerichtshof VIZR 62/80 7.781 (cited in BEUC LEGAL NEWS, Sept. 1984, at 12).

See *infra* notes 97, 99 and accompanying text for the burdens of proof that will be established by implementing legislation under the EEC Product Liability Directive, *supra* note 2, arts. 4, 7, 8.

<sup>33</sup> See *supra* note 11.

<sup>34</sup> See *supra* notes 11, 12, 14.

<sup>35</sup> According to private communications from the BEUC, there have been few complaints in Europe relating to unsolicited goods. See the summary in BEUC NEWS, Nov. 1983, at 2. See also BEUC LEGAL NEWS, Sept. 1983, at 5, for the extension of the reflection time right in the 1983 Luxembourg consumer protection law; OECD, MAIL ORDER TRADING AND OTHER SELECTED DISTANT SELLING METHODS (1978); *Never, Never, THE BUL-*

4. Insufficient or false information (including prices);<sup>36</sup>
5. Come-ons, advertising, promotions;<sup>37</sup>
6. Warranties offered (or imposed) as to goods and services;<sup>38</sup>
7. Responsibilities imposed for damage or injury;<sup>39</sup>
8. Fairness of contract terms.<sup>40</sup>

## II. Consumer Protection

### A. National Approaches

Although consumers, legislatures, and administrative or executive authorities have frequently disagreed about national needs for consumer protection, there have been encouraging developments in Europe. The United Kingdom regulated door-to-door financial services, sales, and tour promotions after several scandals involving these businesses.<sup>41</sup> Several countries have adopted consumer protection laws.<sup>42</sup> Many countries, particularly those in Scandinavia,

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LETIN, Feb. 1985. For a discussion of pricing deception protections for consumers, see *supra* note 12.

<sup>36</sup> See *supra* notes 11-12, 35.

<sup>37</sup> See *id.*

<sup>38</sup> See *supra* notes 12-14.

<sup>39</sup> See *supra* notes 11, 12, 14, 16, 19.

<sup>40</sup> See *supra* notes 12, 14, 35.

<sup>41</sup> See *supra* note 12.

<sup>42</sup> Within the EEC, the right of consumers to relief against foreign suppliers of goods and services is aided by two EEC conventions (Brussels Conventions):

(1) Sept. 27, 1968 "Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters" providing for the immediate execution elsewhere in the EEC of judgments rendered in one Member State; and

(2) Oct. 9, 1978 Convention on the right of a resident of one Member State to bring suit at his domicile against a resident of another Member State (O.J. L 304/77, Oct. 30, 1978).

A list of consumer protection laws of major OECD countries follows. Among the principal architects of consumer policy and protection in Europe are the "European Consumer Law Group," an ad hoc group of legal experts with a secretariat at the BEUC (European Office of Consumer Unions) in Brussels, and the BEUC itself.

#### *Consumer Protection Laws*

1. Belgium: Trade Practices Act 1971.
2. Denmark: Marketing Practices Act (June 14, 1974).
3. Finland: Consumer Protection Act (Act 38); Consumer-Ombudsman Act, both promulgated Jan. 20, 1978.
4. France: Law of July 21, 1983 on consumer safety establishing consumer safety committee. See BEUC NEWS, Dec. 26, 1983; BEUC NEWS LEGAL SUPP., July 1985. See *supra* note 26 as to the proposed French consolidated consumer code.
5. Germany: Law on the Regulation of General Conditions of Sale (1976).
6. Ireland: Consumer Information Act of 1978; Sale of Goods and Supply of Services Act of 1980.
7. Italy: Fair Trading Act of 1971.
8. Luxembourg: Consumer Protection Law of Aug. 25, 1983. See BEUC LEGAL NEWS, Sept. 1983, at 1.
9. Norway: The Product Control Act of June 11, 1976, amended June 3, 1977.
10. United Kingdom: The Supply of Goods and Services Act of 1982. See BEUC NEWS (1983). See also EUROPEAN CONSUMER LAW (T. Bourgoignie ed. 1982); BEUC NEWS, Apr./May 1985 (summary of action taken and pending); European Consumer Law Group.

have adopted laws relating to specific consumer protection issues. Other countries have given governmental or semi-governmental bodies a broad consumer protection mandate.<sup>43</sup>

The primary focus of European legal development in the consumer protection area has been protection of the public rather than indemnification of victims. Pecuniary relief is largely regarded as the domain of insurance. Although punitive controls are necessary, in the European view, protective regulations are more valuable than those that censure.

Another encouraging trend for industry is that cost-to-benefit analysis is a principle which regulatory authorities in some countries must consider in imposing consumer protection controls.<sup>44</sup> This principle will probably be endorsed in future European Economic Community (EEC) rule making proposals as it presently is in EEC regulation of pharmaceuticals and environmental issues. The Organization for Economic Cooperation and Development (OECD) also advocates use of cost analysis in designing consumer protection and industrial controls.

The practices that have recently been addressed by both national and multilateral laws fall into three basic categories:

1. Sales practices;<sup>45</sup>
2. Normalization, standardization and labeling;<sup>46</sup>

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*Non-Legislative Means of Consumer Protection*, 6 J. CONSUMER POL'Y 209 (1983) [hereinafter cited as *Non-Legislative Means*].

<sup>43</sup> See *supra* note 23.

<sup>44</sup> See OECD, *PRODUCT SAFETY: RISK MANAGEMENT AND COST-BENEFIT ANALYSIS* (1983). The principle of cost-benefit analysis can be abused. It is clear, however, that a request for a cost-benefit analysis is a proper ground for deferring action on a directive. A recent example was the Italian request in 1984 for a cost-benefit analysis of the entire EEC Draft Directive on Product Liability. It is unclear whether such analysis was in the interest of the consumer and would provide a more solid backing for the adoption of national legislation conforming to the Directive. The principle of unanimity, that the EEC must justify to each member the grounds necessary for national adoption of a directive, appears clear. See BEUC NEWS, Feb. 1984, at 1.

<sup>45</sup> See *supra* notes 12, 13, 23, 35.

<sup>46</sup> The consumer protection and product liability fields have been particularly difficult to "harmonize" because of well-developed laws in several countries. See *supra* note 42. Consumer recourse and remedies under EEC law are summarized in BEUC LEGAL NEWS, Dec. 1983, at 6. See *Memorandum on the Approximation of the Laws of Member States Relating to Product Liability*, PRODUCT LIABILITY IN EUROPE 145 (1975). In the absence of a possibility of true harmonization, the result has been: (1) delay on the Dangerous Toy Directive (now expected soon) and slow progress on the Product Liability Directive; (2) a failure to act on the asbestos issue; (3) ineffective measures; and (4) directives which add a layer of recourse without harmonizing national law, and ultimately diverse new national measures. See *supra* notes 8, 11.

When the EEC makes new law, there is no method for harmonizing the development of jurisprudence except as to those issues which have been preempted by the new law. The absence of interpretive aids tends to expedite the diversity of jurisprudence rather than formulate coherent, unified new law. See the express disclaimer of preemption in the commentary to the EEC Product Liability Directive, *supra* note 2. The non-preemptive principle appears in the preamble and in article 13.

The EEC has considered adoption of directives based on standards accepted by indus-

### 3. Warranties and product liability.<sup>47</sup>

#### B. Sales Practices

Various national standards exist without a clear pattern. One type of regulation generally addresses the relationship between sales practice and contractual liability in claims based upon deceptive or exaggerated advertising and marketing.<sup>48</sup> The principle of "fairness" is also enshrined in most of the European consumer protection laws.<sup>49</sup>

In keeping with the European preference for using governmental intervention rather than private litigation to enforce consumer protection, damage to any one consumer does not generally constitute grounds for legal action, and collective or class actions are rarely allowed. Class action relief is very uncommon in Europe except through joinder of related cases, and in France, through collective consumer group actions for exemplary damages.<sup>50</sup>

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try. This procedure, favored by Commissioner Narjes, was too close to the support of industry positions for some of his staff. However, after the repeated failure of the EEC Council to adopt specific EEC standards, it has become the major current EEC harmonization initiative.

At the end of January 1985, the Commission issued a Communication setting out its views on *reducing* the harmonization of technical laws. Henceforth it would lay down only "essential safety requirements or other requirements of common concern" in Directives, and would entrust the drawing up of technical standards to the European standardization bodies (CEN, GENELEC); as a transitional measure, it would even accept national standards.

BEUC NEWS, June 1985, at 2. See also BEUC NEWS, Feb. 1985, at 3; *EEC Deregulation*, THE ECONOMIST, Feb. 16, 1985, at 62. See also EEC Technical Standards Directive 83/189/EEC, *supra* note 11, establishing an information procedure in the field of technical standards and rules. See *Non-Legislative Means*, *supra* note 42, for a discussion of the history, types, and experience with industry codes from the points of view of the self-regulating trades and consumers.

In Belgium and the Netherlands, collective agreements between consumer and producer groups may create arbitral commissions (bi-partite, or with government representation). Sales contracts then provide for intervention of the commission in cases of dispute. See the description of Belgian agreements between producer and consumer groups in BEUC LEGAL NEWS, Sept. 1983, at 2.

The best summary of voluntary codes and bi-partite agreements appears in *Report on Non-Legislative Means of Consumer Protection*, European Consumer Law Group, Louvain-la-Neuve Doc XI/872/82-EN (1982). The proposal of "Voluntary Agreements" under the EEC's Second Consumer Action Programme, *supra* note 3, has not aroused much interest. These codes would be applicable only to the signatories because there is no official participation in negotiation, monitoring, or sanctions. Nevertheless, in several EEC countries negotiated bi-partite codes exist between producers or trade organizations and consumer groups. The subject matter and procedures vary from country to country.

<sup>47</sup> See *supra* notes 2, 12, 13. See generally 4 PRODUCT LIABILITY INTERNATIONAL (J. Ashworth ed. 1982); H. TEBBENS, INTERNATIONAL PRODUCT LIABILITY (1979); PRODUCT LIABILITY IN EUROPE (1975) (reviewing national law); T. Bourgoignie, *Where We Stand on Product Liability*, BEUC NEWS, Feb. 1984; Whincup, *supra* note 12.

<sup>48</sup> See *supra* note 2.

<sup>49</sup> See *supra* note 12. Lawyers and courts do not get the chance to debate "fairness" in Europe because administrative bodies and officials, such as ombuds, rather than judges, make fairness determinations. See *supra* note 23.

<sup>50</sup> See *supra* note 26.



The OECD has been very active in harmonizing and upgrading national standards in the sales practices area. The OECD has suggested sales practices standards in the following areas:<sup>51</sup>

1. Rules on mail order and door-to-door sales and "Tupperware" and "Avon" sales promotion parties;<sup>52</sup>
2. Sales of insurance, financial and other services door-to-door or by telephone appointment;<sup>53</sup>
3. Deceptive financing or description of total costs, such as "no payment until September," "interest free," and "only thirty-eight dollars" (for each of three months);
4. Incentives or "stamp" promotions through free coupons, toys or trinkets, rebate, or cash refund tickets, which are increasingly being banned in Europe;<sup>54</sup>
5. Unsolicited and mail-order goods which are already well controlled;<sup>55</sup>
6. Unfair contract clauses (unreasonably strict or costly conditions for obtaining benefit of warranty).<sup>56</sup>

These standards may frustrate some consumer marketing schemes embracing all of Europe.

### *C. Disclosure and Labeling*

Requirements for disclosure are counterparts to unfair sales practices.<sup>57</sup> Consumer protection laws increasingly impose two sets of requirements on labeling and on product ingredients. The first type involves specific labeling standards requiring symbols for poisonous, flammable, corrosive, or temperature sensitive materials and designation of the ingredients, additives, colorants, preservatives, and shelf life of foods, cosmetics, and pharmaceuticals. The second type of regulations require general rules of fair presentation, like naming a product non-deceptively (for example, not naming cookies made with vegetable oil "Buttercups").<sup>58</sup>

Specific standards are being adopted throughout Europe because of the harmonizing efforts of the OECD, including Scandinavia. The EEC has also encouraged uniformity in the food, pharmaceuticals, additives, and chemical areas under its Treaty of Rome article 100 powers.<sup>59</sup>

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<sup>51</sup> The OECD includes all of western Europe except the smaller states (Liechtenstein, Monaco, San Marino, Vatican, Andorra, Malta and Cyprus). The members are Iceland, Norway, Sweden, Finland, *Denmark, Netherlands, Belgium, Luxembourg, Germany, Switzerland, Austria, Ireland, United Kingdom, France, Portugal, Spain, Italy, Greece*, and Turkey as well as the United States, Japan, Canada, Australia, and New Zealand (EEC members italicized).

<sup>52</sup> See *supra* note 36.

<sup>53</sup> See *supra* note 22.

<sup>54</sup> See *supra* note 12.

<sup>55</sup> *Id.*; see also *supra* note 35.

<sup>56</sup> See *supra* note 12.

<sup>57</sup> See *supra* note 11.

<sup>58</sup> *Id.*

<sup>59</sup> See *supra* note 46.

In contrast, the general rules are to date a matter of national regulation and OECD recommendation. The road to achieving a common market for goods and services even within the EEC is not yet clear. The ghastly mess created by the EEC when they tried to draft directives for Euro-beer and Euro-pork chops made everyone reach for a Euro-aspirin.<sup>60</sup> As a result, reluctance to create too much regulatory detail in writing is well established in Europe except in the food and pharmaceutical product area.<sup>61</sup>

#### *D. Product Safety and Labeling*

Each country has had a different legal response to product safety and labeling, although every country has imposed some standards. In several countries, industry groups, collaborating with private consumer groups and/or with state councils, have adopted codes and norms that are generally only binding on member companies.<sup>62</sup> Some codes have been negotiated with government support.

Trade practice codes are rarely detailed. In the critical "FDA" area, the requirements for labeling are generally set by government authorities in cooperation with concerned industries or by the OECD and EEC as part of their multinational efforts.<sup>63</sup> The recent EEC initiative favoring harmonization of regulation by adopting standards set privately by industry associations may indicate a move to a more realistic and successful effort in this area. To date none of these codes has been extended by decree to have the force of law for all affected companies, as labor agreements have been extended to cover entire industrial sectors. Nevertheless, courts rely on codes and norms that delineate expected trade practices.

#### *E. Disclaimers*

Labeling may be designed to meet minimum consumer protection standards. It may also be a vehicle for eschewing liability by asserting in fine print that the labeled product has no warranties and is safe until used. In Europe, attempts to disclaim liability will be unsuccessful because manufacturers and sellers are strictly liable for injuries caused by defective products they market. In addition, strict liability eliminates common law obstacles to a victim's recovery, such as commercial privity requirements, level (regarding infants, for example) or nature (for example, "reasonable man") of standards of care, and foreseeability of victim or danger.<sup>64</sup> Nonetheless, invalida-

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<sup>60</sup> *Id.*

<sup>61</sup> See *supra* note 11. This corresponds to the FDA area of jurisdiction in the United States.

<sup>62</sup> See *supra* note 42 for a sample listing of national legislation.

<sup>63</sup> See *supra* note 11.

<sup>64</sup> See *supra* note 5.

tion of contractual disclaimers and imposition of strict liability for product related injuries is not onerous for insured businesses because European judges do not give "bleeding heart" damage awards as U.S. juries frequently do.<sup>65</sup>

#### F. Restrictive Trade Practices

The EEC prohibits restrictions on cross-border flow of goods within the Community.<sup>66</sup> The landmark case, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*,<sup>67</sup> precludes member states from banning foreign goods that do not meet domestic legal requirements from their markets. Legal action, however, against other EEC manufacturers may be taken if foreign goods fail to meet stricter national fair labeling and product quality standards that are reasonably necessary for consumer protection.<sup>68</sup> In addition, it is questionable whether *Cassis de Dijon* can be relied on because the northern tier EEC members have no intention of letting the three new Southern members, Portugal, Greece, and Spain, export goods like toys, made without any appreciable safety standards, to other markets within the EEC. As a result, more consumer protection litigation concerning permissible product safety and labeling standards is inevitable.<sup>69</sup>

In many countries restrictive or exclusionary trade practices promoted by national industries, such as German producers of "purer" beer, French sparkling wine producers, and suppliers of services, such as insurance, continue to masquerade as consumer protection. Such national "consumer protection" regulations, which the OECD has regularly resumed, have often run into conflict with the principle of free movement of goods within the EEC. This issue is far from resolved despite efforts at agreement on standards.<sup>70</sup>

The role of the EEC and the OECD in the consumer protection regulatory area has been both to push for more strict standards and to fight for open international markets, providing certain minimum

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<sup>65</sup> See *supra* note 14; see also *supra* note 12 for the availability of legal assistance insurance in Belgium.

<sup>66</sup> The Treaty of Rome provides for free circulation of goods and for limitations on this right in the case of protection of public health and safety. Treaty of Rome, *supra* note 3, arts. 30, 36.

<sup>67</sup> 1979 E. Comm. Ct. J. Rep. 649, 3 COMM. MKT. L.R. 494. See 23 O.J. EUR. COMM. (No. C 256) 2 (1980): "Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State." See the discussion on the application of this rule to the German beer purity law in BEUC NEWS, Sept. 1983, at 3. A general book on the subject is P. OLIVER, FREE MOVEMENT OF GOODS IN THE EEC (1982). See also BEUC NEWS, Mar. 1985, at 5; *The Consumer: A Force Against Protectionism*, OECD OBSERVER, July 1984, at 22; *Consumer Redress Under European Competition Law*, BEUC LEGAL NEWS, Dec. 1983.

<sup>68</sup> See *supra* note 13.

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., *supra* notes 2, 13, 42.

standards are met.<sup>71</sup> Indeed, British manufacturers have pressured the United Kingdom to adopt broader defenses to conform with the scope of defenses allowable under the new EEC Product Liability Directive.<sup>72</sup> These manufacturers seek to institute the "development risk defense" in British law. Article 7(e) of the Directive permits this defense, but it is not yet part of British jurisprudence.<sup>73</sup>

### G. Warranties and Product Liability

No attempt is being made to summarize European law on warranties and product liability because the national laws of twenty countries, most of which are now EEC members, must be studied.<sup>74</sup> There is no OECD law; it is not a law making body. The Council of Europe has long been silent<sup>75</sup> and the effects of the EEC Directive are still unclear. Although specific EEC directives do regulate food, pharmaceuticals, cosmetic ingredients, and dangerous substances, these directives mainly control labeling and permitted ingredients.<sup>76</sup>

The EEC has established some consumer protection regulations governing the health and safety of food, pharmaceuticals, and other consumer products, such as cosmetics, clothing, electrical appliances, and to a certain extent, automobiles. The EEC, however, has only recently established product liability standards.<sup>77</sup> As a result, national rules have provided more effective product regulation and probably will continue to do so.<sup>78</sup>

National laws require manufacturers' warranties for many products.<sup>79</sup> Such warranties, and the terminology in which they may and must be expressed, will probably continue to be governed by national legislation, even after national legislatures adopt the EEC Directive's principles on warranties and product liability.<sup>80</sup>

The principal contract remedy is enforcement of the parties' obligations. There is no right to pay for the right to default. Specific performance is the first right assured by various national consumer

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<sup>71</sup> See *supra* notes 24, 46, 66.

<sup>72</sup> See *supra* note 1.

<sup>73</sup> The European Parliament took the "development risk" exclusion out of the EEC Commission's original proposal for a Product Liability Directive, *supra* note 2. In the final compromise text, the exclusion has been reincluded at the request of Britain as an option available under national implementing legislation. The exclusion may be revised or eliminated after 10 years (in 1995) pursuant to article 15.3 of the Directive.

<sup>74</sup> See generally *supra* notes 2, 47. National laws vary from very severe (France, Germany, United Kingdom, and Scandinavia) to practically non-existent (Greece, Spain, and Portugal) according to the EEC Commission. This disparity in national product liability laws has made harmonization difficult.

<sup>75</sup> The Council of Europe dealt only with abusive contract clauses. Res. 78(3), adopted Jan. 20, 1978. It has no appreciable legal effect.

<sup>76</sup> See *supra* note 11.

<sup>77</sup> EEC Product Liability Directive, *supra* note 2.

<sup>78</sup> See *supra* note 9.

<sup>79</sup> See *supra* note 12.

<sup>80</sup> See *supra* note 14.

protection statutes. A buyer has the right to replace or repair defective merchandise, or if the defect is not remediable, the option of reimbursement for the difference in value. The EEC is not working on these consumer product rights that remain the subject of national law.<sup>81</sup>

Manufacturers of automobiles, appliances and consumer durables now offer "peace of mind" contracts for an extended warranty to obtain payment for the warranty services required by national laws.<sup>82</sup> These contracts also establish the warranty's scope and put the occasional "lemon" into a pooled insurance risk for all buyers. Little attention has been directed to the possible abusive aspects of obligatory service contracts—use of the contracts to shift warranty costs to the consumer.

#### *H. Means of Recourse*

The legal structure of bodies charged with the development, promulgation, and enforcement of consumer regulations varies widely from one country to another. Consumer departments or ministries exist in several countries. Their authority to stop sales of goods, to order recalls to make good, or to reimburse, and their civil and criminal prosecution powers vary widely.<sup>83</sup> In Scandinavia, the ombud, an "official conscience" with investigative, subpoena, and injunctive powers has been the chosen means of consumer protection. The ombud institution<sup>84</sup> appears unlikely to spread, however, despite its success and effectiveness in Scandinavia. Consumer councils work well in Britain and Denmark but have failed to excite the continent to action.<sup>85</sup> Although market courts adjudicate disputes between merchants and consumers in several countries, these courts only have "small claims" jurisdiction.<sup>86</sup>

The importance and effectiveness of European institutions regulating consumer protection may be difficult for U.S. trained lawyers to appreciate. Most European countries have not chosen to use private litigation as an arm of public policy. Instead, most European governments have become more directly involved in regulating consumer protection through consumer ministries, ombuds, consumer councils, and prohibiting sale of dangerous products. In addition, private litigation is not effective as an immediate remedy for injury because the civil law system places parties in the position they expected to be in before suffering injury.<sup>87</sup> Even when civil law permits

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<sup>81</sup> See *supra* note 2.

<sup>82</sup> See *supra* note 13.

<sup>83</sup> See, e.g., *supra* notes 18, 23, 24.

<sup>84</sup> See *supra* note 23.

<sup>85</sup> See *id.*

<sup>86</sup> See *supra* note 18.

<sup>87</sup> See generally *supra* note 11.

joinder of a civil complaint to a criminal complaint, the complainant only receives compensation for his damages; any criminal penalties are still paid to the state.<sup>88</sup> Consequently, many disputes are not litigated. Less litigation also means far heavier social charges on employers and employees taking the place of a large part of the manufacturers' insurance burden to pay medical costs of victims of product accidents.<sup>89</sup>

### *I. Law of Product Liability*

Manufacturers and sellers are generally strictly liable for injuries arising through imperceptible defects in a product during its normal, intended use.<sup>90</sup> Strict liability cannot be limited by contract or disclaimer. The burden of proof of product defect and injury, however, remains on the victim.<sup>91</sup> The U.S. legal concepts of negligence, *assumpsit*, reasonable care, the common man, and poor old *Palsgraf*<sup>92</sup> are of little relevance in Europe. Because the civil law governs all commerce and its consequences, single cases cannot be analyzed in terms of the distinctions between contract and tort, and between design defect and failure. The civil law contains the comparative negligence principle generally found in the one form of civil law used in common law jurisdictions: admiralty law.<sup>93</sup> Comparative negligence, which may be called *pro rata* causality or responsibility, is a method of allocating damage recovery. Because the EEC Directive

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<sup>88</sup> See generally *supra* note 19.

<sup>89</sup> See *supra* notes 12, 20.

<sup>90</sup> See *supra* note 8.

<sup>91</sup> See *supra* note 14.

<sup>92</sup> *Palsgraf v. New York Cent. Ry. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), established that the contributory negligence of a plaintiff-victim in tort did not bar recovery of his damages caused by the fault of a third party. This is also the rule in civil law, which is closer to the admiralty rule of proportional fault or comparative negligence. See article 8 of the recent EEC Product Liability Directive, *supra* note 2, which provides for comparative negligence (inappropriately called contributory negligence) as a basis for reduction or limitation of recovery, contrary to the general principle of joint and several liability in article 5.

<sup>93</sup> The term "contributory negligence" was added to the draft EEC Product Liability Directive by the European Parliament. Its intention, however, was not to bar a recovery by negligent victims, but to measure the relative contribution of their fault to the damages. The correct term is probably comparative negligence, a principle well-founded in the civil law and also known in U.S. admiralty. The Directive purports to create strict liability so the term "comparative negligence" is avoided, even if the concept remains. Article 3 of the 1979 draft (O.J. No. C/271/87 of Oct. 1979) provides that two persons who are liable are "liable jointly and severally, each person retaining the right to compensation from the other"—a mix of rights of contribution and contributory negligence. Article 6 of the final text leaves the right of compensation to chance and forum shopping by providing that each person is "liable jointly and severally without prejudice to the provisions of national law concerning the rights of contribution or recourse." EEC Product Liability Directive, *supra* note 2, art. 6. An explanation of dangers posed when comparative negligence is combined with joint and several liability appears in Granelli, *The Attack on Joint and Several Liability*, A.B.A. J., July 1985, at 61 (one solvent defendant, even if only one percent responsible, may be obliged to pay all the damages).

adopts comparative negligence,<sup>94</sup> the common law doctrine of "clean hands," with its bar to claims for recovery by contributorily negligent parties, will not become part of continental law.

Sellers are apparently shielded from liability to injured buyers only when obvious defects create such injuries. According to the civil law principle of hidden defect, "vice cache" in French, sellers are responsible for all hidden defects.<sup>95</sup> In contrast to the origins of U.S. product liability law,<sup>96</sup> manufacturers not in privity with retailers distributing their products are also strictly liable for product-related injuries. In addition, sellers and manufacturers are generally jointly liable, but with rights of contribution under the principles of comparative negligence. The distinction between "joint" and "several" liability is one of those fine points of Anglo-Saxon law that has never crossed the English Channel. Recently, a trend favoring no-fault product liability has developed, which will require establishment of a collective fund or insurance plan.<sup>97</sup>

The civil law system also holds bailors, lessors, and free sample suppliers liable for product-related injuries.<sup>98</sup> In addition, the recent EEC Directive makes importers into the EEC liable to the same extent as EEC manufacturers.<sup>99</sup> It is impossible to predict whether

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<sup>94</sup> See *supra* notes 92 and 93.

<sup>95</sup> See *supra* note 5.

<sup>96</sup> See *supra* note 4 for the RESTATEMENT law on products liability.

<sup>97</sup> The EEC Product Liability Directive, *supra* note 2, leaves to national law both the definition of the causal relationship under the EEC cause of action, and the determination whether the victim will have any other causes of action. Because it is unclear whether the EEC cause of action is based on strict liability (as stated in the preamble) or on fault (defect and causation as stated in articles 4 and 6), it is unclear whether negligence would have any effect on the initial determination of liability, on the determination of comparative and contributory liability under article 8, or on the amount of damages (unless punitive damages are allowed).

Generally, in Europe as in the United States, serious fault or "gross negligence" (*dol* in French) will increase civil responsibility, partially excuse contributory negligence, and may create criminal as well as civil liability. See *supra* note 19. The interaction of these principles with the EEC cause of action will require judicial clarification.

<sup>98</sup> In Europe, the extension of liability from sellers and manufacturers to lessors, bailors, and suppliers of free samples has not been marked with the difficulties encountered in the United States. Originally, the U.S. courts relied on a need for contractual privity, and more recently, on a relation under the U.C.C. See Goldstein, *supra* note 6, at 962, for a description of the U.S. use of the "stream of commerce" theory to expand liability to suppliers of goods other than sellers.

The EEC Product Liability Directive, *supra* note 2, despite its reference to "entry into circulation," is a *producer's* liability law. As to other parties in the stream of commerce, the Directive is more ambiguous to the extent that article 3.2 imposes liability on lessors and perhaps on suppliers of free samples (article 7(c)), but probably not on bailors, or even on retailers who have reason to know of the defect. The Directive may therefore block the progress of EEC law towards extended consumer rights by creating a rabbit-warren of illogical distinctions.

<sup>99</sup> The EEC Product Liability Directive imposes liability on an EEC importer in lieu of the producer, even if the producer is present. See EEC Product Liability Directive, *supra* note 2, art. 3.2. It is not clear whether an importer standing in the position of the producer can use defenses available to a producer to avoid liability. If such defenses are un-

the Community will adopt the U.S. legal principle of liability for "composite business enterprises."<sup>100</sup> Each European country has addressed this problem by providing different liability limitations and exclusions. The developing U.S. law of licensor liability,<sup>101</sup> exemplified by *Canifax v. Hercules Powder Co.*<sup>102</sup> and *Connelly v. Uniroyal, Inc.*,<sup>103</sup> has not been followed in Europe. The *Hercules* and *Uniroyal* courts imposed strict liability on trademark licensors based on implied duties rising from quasi-tort and quasi-contract principles. This sort of judicial extrapolation is very uncommon in civil law countries; European laws of liability explicitly hold manufacturers and sellers strictly liable for injuries caused by their products. New consumer protection laws, however, impose liability on licensors when consumers have relied to their detriment on the purported quality of a product. In addition, article 3.2 of the EEC Product Liability Directive imposes liability on trademark licensors for defective products without regard to consumer reliance on the mark.<sup>104</sup>

Although negligence has not been discussed, fault and serious fault are factors that increase liability in the civil law system. Because fault implies knowledge, it also heightens the responsible party's liability for injury.<sup>105</sup> Because criminal penalties are often imposed on parties for fault, additional liability frequently results in fines paid to the state rather than a windfall for the victim. The EEC Directive will not preempt civil or criminal liability for negligence. As a result, businesses will need to insure both their officers and products and negotiate for tax deductibility of product liability insurance premiums and payments.<sup>106</sup> Consequently, products' liabilities are often of more concern to insurance advisors than legal counsel.

The social welfare net, which in most European countries includes free medicine, doctors, hospital care and state paid benefits during illness or incapacity, has put on the state the economic burden of proving medical expenses and earnings lost by persons injured by defective products.<sup>107</sup> Civil damage suits and insurance

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available, however, the right of contribution and recourse found in article 5 makes no sense.

<sup>100</sup> U.S. laws have tended towards the creation of a theory of "group" responsibility for legal obligations related to export controls, boycotts, corrupt practices, tax (unitary tax), obligations to employees and unions, etc. It is not clear whether this trend might be relied upon by a European court to find a U.S. parent organization liable for acts of a subsidiary or affiliate.

<sup>101</sup> See Goldstein, *supra* note 6. For a recent review of U.S. law, see Poms and Merkadeau, *Product Liability of Trademark Licensor*, LES NOUVELLES, Mar. 1986, at 32.

<sup>102</sup> 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

<sup>103</sup> 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *cert. denied*, 444 U.S. 1060 (1980).

<sup>104</sup> See *supra* note 30.

<sup>105</sup> See *supra* note 97.

<sup>106</sup> See *supra* note 19.

<sup>107</sup> The rapid rise of insurance rates in the United States in the 1970s was due to (1) an increase in the number of persons liable; (2) a decrease in the types of defenses allowed; (3) increased awards of punitive damages; (4) an extension of statutes of limitations;



relate principally to pain and suffering damages, and exemplary damages when and if they are permitted.<sup>108</sup> Double, treble, and punitive damages are generally not available in Europe.<sup>109</sup> In addition, attorneys' contingent fees are illegal in most of Europe.<sup>110</sup> As a result, insurance claim settlements are a fraction of the inflated capitalized payments that are made in the United States. The injured European party will, therefore, often settle rapidly to receive his real damages, excluding state insured costs.<sup>111</sup> Any penalties recovered may go to the state and are separately negotiated by the responsible manufacturer, often without tax relief or availability of insurance if deduction of penalties or premiums is against public policy.<sup>112</sup>

Recovery of "real money," in plaintiff's terms, may be difficult for European claimants. The civil law enforces the bargain, replacement, or make-good. Loss of profits or loss of a product's economic use is far more difficult to claim successfully.<sup>113</sup> The buyer should probably insure himself against such economic losses, and his insurance company can perhaps claim as subrogee.<sup>114</sup> The recourse for economic loss is perhaps best left to the laws governing relations between merchants, including commercial codes and the United Nations Convention on the International Sale of Goods. In many countries, jurisdiction of merchant disputes is in special commercial courts.<sup>115</sup>

A logical way to counterbalance the obligations and costs the state assumes in compensating product defect or accident victims, typically on a total no-fault basis,<sup>116</sup> would be to reduce or eliminate

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(5) the existence of contingency fee claims; and (6) the absence of the "social net" of state-paid medical and rehabilitation costs. *See supra* note 20.

Under the civil law system, the winning party in civil litigation may recover a substantial part of his legal fees from the other party. In Germany, the court determines these fees according to a schedule fixed by law. In France, the attribution of costs and fees is at the discretion of the judge. Fisch, *supra* note 19, at 54-56. In these countries, legal aid (state-paid counsel) is probably more available to the public than in the United States, and contingent fees are deemed unethical because they undermine the independence of the attorney as an officer of the court. *Id.*

<sup>108</sup> *See supra* notes 11, 16.

<sup>109</sup> *See supra* note 16.

<sup>110</sup> *See supra* note 107.

<sup>111</sup> *See generally supra* notes 11, 107.

<sup>112</sup> A limit of 25 million European units of account (EUAs) was set by article 7 of the EEC Draft Directive. Article 16 of the Product Liability Directive, as adopted, permits member states to adopt a 70 million EAU limit for all damages caused by identical articles with the same defect. The limit in the Directive includes pain and suffering, death, and injury. No limits are set for property damage. The limit may be revised or eliminated after 10 years pursuant to article 16.2 of the Directive.

The EUA is defined by Financial Regulation 3180/78 of Dec. 1978, O.J. No. L 379/1 of Dec. 30, 1978, as amended by Regulation 2626/84 (247 O.J. of Sept. 16, 1984), at 1. *See also supra* note 12.

<sup>113</sup> *See supra* note 14.

<sup>114</sup> *See supra* note 107.

<sup>115</sup> *See supra* note 2.

<sup>116</sup> *See supra* note 5.

tax deductions for product liability payments or for any augmented risk insurance premiums. These tax reform measures would make the state, via the tax system, a partner in any recovery of costs of indemnifying injured persons. There could, of course, be a counter-productive effect on voluntary make-good and new product development if such a rule were adopted.<sup>117</sup> At present, even fines are tax deductible, although the German government has proposed to change this practice.

### III. European Efforts

#### A. Consumer Protection

Several European bodies have undertaken efforts to arrive at a consumer protection program. The Council of Europe proposed a trade practice code in 1973. In 1977 the Council opened the Strasbourg Convention on product liability for signature.<sup>118</sup> The Convention, however, is binding only on countries that ratify it. Four countries have signed the Convention, and none have ratified it. Prior to adoption of the EEC Directive, prospects for ratification of the Convention were poor. In view of adoption of the EEC Directive, it may be considered dead.

Other efforts to formulate a uniform consumer protection program have been equally unsuccessful. The Hague Convention of October 1973<sup>119</sup> has four signatories; the 1980 EEC Convention on Contract Rights has none. United Nations efforts, particularly the consumer protection guidelines formulated by the UN ECOSOC and opposed by the United States, only pose a remote threat to manufacturers.<sup>120</sup> United Nations' efforts, however, may incite the OECD to

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<sup>117</sup> See *supra* note 19.

<sup>118</sup> The Strasbourg Convention is the popular name for the European Convention on Products Liability in Regard to Personal Injury and Death, Jan. 27, 1977, Europ. T.S. No. 91, reprinted in *PRODUCT LIABILITY IN EUROPE* 131 (1975). This Convention is highly regarded by the BEUC. BEUC News, Feb. 1984, at 1. The Convention does not cover damage to property. Defenses include: (1) latent defects, (2) the placement of goods in commerce by a party other than the manufacturer, and (3) comparative negligence.

<sup>119</sup> The Convention on the Law Applicable to Products Liability, Oct. 2, 1973, 1977 Recueil des Traites et Accords de la France 82, applies to non-contracting states. The United States could benefit from exemption under the "federal state exception" for a state that has different territorial units with separate laws. The Convention excludes raw agricultural products and does not set time limitations on enforcement of a victim's rights. The Convention on the Law Applicable to Products Liability is reproduced in *PRODUCT LIABILITY IN EUROPE* 127 (1975).

<sup>120</sup> The United Nations ECOSOC adopted a set of Consumer Protection Guidelines in July 1983. The aims are like those of other organizations (*e.g.*, the OECD), but the suggested method is exclusively state regulation, so the likely result will be protectionist measures. 21 UN-CTC REPORTER 56 (Spring 1986).

See, *e.g.*, U.N. Gen. Assembly Res. 37/137 of 1982 on exports of hazardous substances. A list of products was completed at the end of 1983. See also International Register of Potentially Toxic Chemicals, prepared by the United Nations Environment Program. This work has led to guidelines for transport, storage, handling, and disposal. The Food and

adopt a consumer protection code or encourage revival of the Strasbourg or Hague Conventions.

The EEC Commission has no system of white papers, reports, or public debate to help it draft rules.<sup>121</sup> Although there have been two EEC declarations establishing a consumer program,<sup>122</sup> the Consumer Protection Directorate (DG XI) has been almost wholly unable to obtain approval of its proposed directives.<sup>123</sup> The EEC DG III has banned certain toxic substances in foods and cosmetics under its delegated trade regulation powers.<sup>124</sup> The DG III, however, has not yet attempted to exercise its delegated powers outside public health and safety issues, even for dangerous toys.

The EEC toxic and hazardous substance regulations copy the OECD information exchange system. Both provide for multilateral information exchange.<sup>125</sup> Any action taken against defective products will probably occur at a national level under product licensing statutes or other legislation because product recall is rare,<sup>126</sup> and there is no "*anti-Cassis de Dijon*" rule to ban everywhere in the EEC products banned in one nation.<sup>127</sup>

Despite the wishes and pronouncements of the EEC Commissioners, the recent trend in the EEC has not been towards a greater Europeanization of laws created by EEC directives with EEC enforcement (and the vastly increased budget and bureaucracy that would ensue), but towards harmonization of European laws, by creating minimum EEC standards.<sup>128</sup> In early 1985, the EEC explicitly endorsed harmonization by adoption of norms formulated by industry. These harmonization efforts may resolve the riddle posed by the *Cassis de Dijon* case concerning how to prevent less strictly made South or East European goods (or goods originating elsewhere) from being sold in countries with more strict consumer protection laws.

It is likely that increased harmonization will be achieved by collective consent. In this area, the OECD has been more thorough and imaginative than the EEC.<sup>129</sup> Membership of all major U.S. trading partners in the OECD and the negative effect of the "*Cassis de Dijon*"

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Agriculture Organization has prepared detailed information on food products, its "Codex Alimentarius."

<sup>121</sup> The Commission occasionally publishes a "white paper" without debate or public hearings. The Parliament and the Economic and Social Committee do not use hearings or "exposure drafts."

<sup>122</sup> See *supra* note 2.

<sup>123</sup> Even the Product Liability Directive was a product of EEC General Directorate III (internal markets), an important distinction if one suspects in error that the new Directive signals the reawakening of the consumer program. See *supra* note 1.

<sup>124</sup> See *supra* note 11.

<sup>125</sup> See *id.*

<sup>126</sup> See *supra* note 24.

<sup>127</sup> See *supra* note 67.

<sup>128</sup> See *supra* note 46.

<sup>129</sup> See *id.*

rule on higher quality, higher priced U.S. goods argues well for increased U.S. support for OECD efforts to curb Euro-protectionism created by Euro-standards. The United States certainly does not want the EEC to become another Japanese Ministry of Foreign Trade (MITI).

### *B. The EEC Product Liability Directive*

The EEC Product Liability Directive<sup>130</sup> of July 25, 1985 will take effect on July 30, 1988. Each country must adopt national implementing legislation before that date. In view of the ambiguities in the Directive, it will probably create diversity rather than unity.<sup>131</sup>

The EEC Product Liability Directive was first proposed in 1976, and then revised by the European Parliament in 1979. Adoption of the Directive, however, stalled in the EEC Council of Ministers because of diversity among existing national laws. Germany's insistence on a monetary limit for all identical articles with the same defect,<sup>132</sup> on defenses for "development risks,"<sup>133</sup> and for "state of the art products"<sup>134</sup> were the principal areas of conflict.

In 1985, resolution of the disputes about a monetary limit,<sup>135</sup> and "state of the art,"<sup>136</sup> and "development risk"<sup>137</sup> exemptions were postponed until 1995—the Directive permits EEC Member States to adopt alternative provisions at least until that date.<sup>138</sup> Although the Directive both supplements and preempts some national laws, it fails to achieve harmonization.

The Directive is unusual in several respects. First, it is a rare example of EEC "new law," created without pretense of being harmonizing law. Second, the Directive creates a private cause of action under national law. Third, it is poorly and inconsistently drafted, even by EEC standards. It is not clear what the national laws must

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<sup>130</sup> See *supra* note 2. See also L. Kramer, CONSUMER LAW AND THE EUROPEAN COMMUNITY (1986).

<sup>131</sup> See descriptions of effect on national laws of Italy, Germany, and Denmark in BEUC NEWS LEGAL SUPP., Mar. 1986, at 13; see also T. Bourgoignie, The July 25, 1985 EEC Directive on Product Liability, Central de Droit de la Consommation, Univ. Louvain-1-N (1986) (unpublished position paper).

<sup>132</sup> See *supra* note 112.

<sup>133</sup> See *supra* note 73.

<sup>134</sup> The state of the art defense is included in the EEC Product Liability Directive, *supra* note 2, art. 6.2. It is important to note that state of the art in Europe does not mean "best available technology" as it does in the United States. It means generally accepted industrial practice at the time of manufacture and initial sale. In a German case, Bundesgerichtshof, VI ZR 191/79 17.3.81, the plaintiff was held responsible for proving that warnings on labeling were in compliance with state of the art technology at the time of the accident. See BEUC LEGAL NEWS, Sept. 1984, at 12. This standard appears stricter than that set out in article 6.2 of the EEC Product Liability Directive.

<sup>135</sup> See EEC Product Liability Directive, *supra* note 2, art. 16(1); *supra* note 112.

<sup>136</sup> See EEC Product Liability Directive, *supra* note 2, art. 15(1)(b).

<sup>137</sup> *Id.* art 7(e); see *supra* note 73.

<sup>138</sup> See EEC Product Liability Directive, *supra* note 2, arts. 15(3), 16(2).

provide to conform to it.<sup>139</sup> Adopting the Directive *in haec verbis* into national law could result in its total or partial invalidation on the grounds of vagueness and inconsistency. Clearly, the new Directive will not result in harmonization in the short term. Instead of creating better protection for consumers, the Directive may initially have the contrary effect. The "state of the art" and "development risk" defenses allowed by the Directive are broader than the defenses now provided by the national laws of several EEC countries. In the United Kingdom, manufacturers are trying to use the Directive as a "Restatement of the Law," seeking to conform British law to the less favorable rights of victims under the Directive.

#### IV. Conclusion

The Product Liability Directive is only a small improvement in the product liability and consumer protection fields. Clearly, product liability has the greatest public policy justification because it protects the populace from physical injury and property damage.<sup>140</sup> The other consumer protection fields, protecting against economic abuses that are often more widespread but less detectable, are predominantly a state concern as tutor for its citizens.<sup>141</sup> The United States should not expect the private cause of action created by the EEC Product Liability Directive to become a model for private or collective class action litigation, enforcing joint private and public rights in Europe as they are enforced in the United States.<sup>142</sup>

Instead, the United States should be aware of the diversity of consumer protection measures existing in Europe and attempt to work through the OECD, in which the United States already has an active presence, to develop the best available consumer protection measures with the least possible bureaucracy. If cooperating with the OECD leads to coordination of consumer rights and normalizes efforts between the OECD nations and the EEC, it will be to the clear advantage of free world trade and economic growth.

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<sup>139</sup> See the differences in the semi-official statements made at the Council of Ministers by the EEC and subsequent opinions of national lawyers. BEUC NEWS LEGAL SUPP., Nov./Dec. 1985, at 20.

<sup>140</sup> See *supra* note 11. Because the state funds social and medical programs, the state has a greater interest in the social cost of product liability than in the United States. See *supra* note 20.

<sup>141</sup> See *supra* notes 18, 23.

<sup>142</sup> See *supra* note 26.